**SUPREME COURT OF KENTUCKY**
**CASE NO. 2014-SC-00383-T**
**COURT OF APPEALS NO. 2014-CA-01076**

**APPEAL FROM**
**CAMPBELL COUNTY CIRCUIT COURT CASE NO. 13-CI-00956**

**GREATER CINCINNATI/NORTHERN KENTUCKY APARTMENT ASSOC. INC, ET AL,** **APPELLANTS**

**-vs-**

**CAMPBELL COUNTY FISCAL COURT, ET AL,** **APPELLEES**

# APPELLEES' BRIEF

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## CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2015, that this motion has been filed with the Court, including the original and ten (10) copies. This brief has also been served on this date by placing copies in the United States Mail, postage prepaid, registered mail, to: Counsel for Appellants, Timothy J. Eifler and Stephen A. Sherman, 2000 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202, Erica L. Horn and Madonna E. Schueler, 300 W. Vine Street, Suite 2100, Lexington, Kentucky 40507, Jeffrey J. Greenberger and Richard L. Norton, 105 East Fourth Street, Fourth Floor, Cincinnati, Ohio 45202; Samuel Givens, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Fred A. Stine, V, Judge, Campbell Circuit Court, 330 York Street, Newport, Kentucky 41071; and Jack Conway, Attorney General of Kentucky, 700 Capitol Avenue, Suite 116, Frankfort, Kentucky 40601. I further certify that the record on appeal has been returned to the Campbell Circuit Clerk's office by counsel for Appellees.

COUNSEL FOR APPELLEES

## STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to the Court's Order entered September 18, 2014, granting Appellee's Motion for Transfer the Court ordered that this matter shall be set for oral argument.

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## I. COUNTERSTATEMENT OF THE CASE

Appellees do not accept the Appellants' Statement of the Case because it fails to adequately and fully develop the essential facts to have a fair and adequate statement of the case.

Ordinance 0-04-13 ("Ordinance"),[1] enacted by the Campbell County Fiscal Court, creates a fee authorized by KRS 65.760 to fund the Emergency Telephone System, which is operated by the Campbell County Consolidated Dispatch Center. R. at 247-48. The fee charged by the Ordinance is used solely for the operation and maintenance of the Emergency Telephone System and the fees collected pursuant to that Ordinance are segregated into a separate fund apart from and completely independent of the Campbell County Fiscal Court's general fund or other funds. R. at 190-192.[2] Furthermore, the fees collected under the Ordinance do not exceed the cost to operate and maintain the Emergency Telephone System. Id.

The Emergency Telephone System is designed, constructed, and funded to serve all of Campbell County, Kentucky. Prior to the enactment of the Ordinance at issue, the Emergency Telephone System was funded by a monthly Three Dollar ($3.00) per telephone line subscriber fee on telephone landlines.[3] R. at 247. This fee amounted to a $36.00 annual charge per telephone line. The subscriber fee was also authorized by KRS 65.760. Unfortunately, due to the continual decline in telephone landlines and the increase in the use of mobile devices, combined with the ever increasing technological upgrades necessary to operate a 911 Emergency Telephone System, the Fiscal Court determined that the service fee was inadequate to continue to provide reliable, quality emergency communication services. R. at 247.

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[1] R. at 18-21. A copy is attached hereto as Exhibit A.
[2] Robert Horine Aff. ¶ 5. A copy is attached hereto as Exhibit B.
[3] The increase in the fee was necessary to compensate for loss of fees due to residents and businesses who maintained more than one landline per unit. R. at 190-192 (Horine Aff. ¶ 9).

The 911 service fee enacted by the Campbell County Fiscal Court applies to each occupied individual residential unit and each occupied individual commercial unit as users whom are benefited by the Emergency Telephone System. R. at 248. Owners of the real property upon which the units exist are responsible for paying the fee on each occupied residential or commercial unit. Id. The Appellant, Greater Cincinnati/Northern Kentucky Apartment Association, represents owners of rental residential real property in which the occupants of their residential units are in possession of the units under a contractual relationship with the owners, who receive a rental fee for the possession of the property. R. at 3-4. These Appellants not only receive the perks of having their tenants enjoy all of the benefits of an Emergency Telephone System, but also received the added use of having their own property interest protected by the Emergency Telephone System. The remaining Appellant is an individual who occupies her residential real estate as owner and, of course, receives the benefit of the Emergency Telephone Systems. R. at 4.

The Appellants acknowledge that KRS 65.760(3) expressly authorizes the levy of a subscriber charge on each telephone landline. Appellant Br. at 1. This same statute expressly authorizes the imposition of a **fee** to fund the 911 system. See KRS 65.760(3). This statute was enacted when a majority of occupied residences had at least one landline telephone. With the increase of wireless telephones and other technologies, many occupied units no longer have landlines but are still receiving the benefits of the 911 system without paying a fee. It is the Appellees belief that the purpose of the landline subscriber charge in the statute was that homes and offices that had landlines would be occupied units and would receive the benefits of the 911 system. The enactment of the Ordinance restored the intent of the state statute that each

occupied residence or commercial unit that is provided with the use of the 911 system would pay a fee to maintain the system.

Appellees dispute the characterization of Appellants that the fee is a 'Property Charge.' Appellants Br. at 1. The fee is only on occupied units and is not a fee on the property. If the unit is not occupied as of November 1st of each year the unit and the property where it is located are exempt from the fee. R. at 19.

Appellees also dispute the Appellants assertion that the Circuit Court's opinion held that "a charge is valid if it merely confers a general benefit upon or funds a service available to the payor." Appellants Br. at 3. The Court's order was that the user fee is valid if the user has as a specific government service available for their use or that the user is specifically benefited by the service being available. R. at 250. All users are "benefited through the general improvement of conditions of health, comfort and convenience." R. at 253.

## II. ARGUMENT

Appellants are correct in stating that local governments possess only those powers delegated by the Kentucky Constitution and Kentucky statutes. Appellants Br. at 3. KRS 65.670 and KRS 91A.510-530 are specific grants from Kentucky statutes authorizing the user fee contained in the Ordinance. There is no doubt that the County has the power to enact the Ordinance. The Ordinance is a valid exercise of the specific legislation provided in KRS 65.670.

The Appellants argue that the Circuit Court failed to consider the Ordinance within the confines of the powers delegated to the County and misapplied Kentucky law. Appellants Br. at 4. By a direct grant of authority in language that could not be any clearer, the Kentucky Legislature, by a unanimous vote in the House and Senate in 1984 enacted into law the

applicable language of KRS 65.760. See S.B. 101, Reg. Sess. Legis. Rec., (KY. 1984).[4] This same law was amended twice, once by near unanimity in 1986, and by unanimous vote in 1998. See S.B. 233, Reg. Sess. Legis. Rec., (KY. 1986)[5]; H.B. 560, Reg. Sess. Legis. Rec., (KY. 1998).[6] The Appellants' argument that the Ordinance is not permitted blatantly ignores the plain language of the statute and proper statutory construction. KRS 65.760 is abundantly clear that Emergency Telephone Systems are different than emergency ambulance and fire services that the Appellants try to analogize to the issue at hand. Emergency fire and ambulance services are specifically regulated through a detailed statutory scheme, and **only permitted** to be funded through ad valorem taxes. See KRS 75.040 et. seq. To the contrary, KRS 65.760 specifically permits the funding of a 911 Emergency Telephone System by not just ad valorem taxes or an assessment, but also by a ***"fee."***

The Appellants' narrow interpretation of KRS 65.760 and KRS 91A.510 et seq. renders these statutes meaningless. Statutory construction rules, as set forth in KRS Chapter 446 and interpreted by case law, require courts to construe a statute in a manner that the legislature intended something by what it attempted to do. Reyes v. Harden County, 557 S.W.3d 337, 342 (Ky. 2001) (citing Gribe v. National Bond, Inc. Co., 94 S.W.2d 612, 617 (Ky. 1936)). Statutes are presumed to be enacted for the furtherance of a purpose on the part of the legislature and should be construed so as to accomplish that end rather than to render them nugatory. Id. (citing Commonwealth Ex Rel Martin v. Commore Distillery Company, 152 S.W.2d 962, 967 (Ky. 1939). "It is presumed . . . that the legislature is acquainted with the law, that it has knowledge of the state of the law on subjects on which it legislates, and that it is informed of previous legislation and the construction that previous legislation has received." Commonwealth v.

[4] A copy is attached hereto as Exhibit C.
[5] A copy is attached hereto as Exhibit D.
[6] A copy is attached hereto as Exhibit E.

Boarman, 610 S.W.2d 922, 924 (Ky. App. 1980); see also Connecticut National Bank v. Germain, 503 U.S. 249, 252 (1992) (finding that courts must presume that a legislature says in a statute what it means and means in a statute what it says there).

KRS Chapter 446 gives the Court further guidance in interpreting the statutes by stating:

> Courts presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes . . . We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one . . . Only if the statute is ambiguous or otherwise frustrates a plain reading, do we resort to extrinsic aids such as the statutes' legislative history; the canons of constructions; or especially in the case of model or uniform statutes, interpretations by other courts.

Jefferson Cnty. Bd. of Educ. v. Fell, 391 S.W.3d 713, 718-19 (Ky. 2012) (citing Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542, 551 (Ky. 2011)). Furthermore, KRS 446.080(1) states that "[a]ll statutes of this state shall be ***liberally construed*** with a view to promote their objects and carry out the intent of the legislature." (emphasis added); see also Jefferson Cnty. Bd. of Educ., 391 S.W.3d at 718 (citing Shawnee Telecom Resources, Inc., 354 S.W.3d at 551); MPM Financial Group, Inc. v. Mortan, 289 S.W.3d 193, 197 (Ky. 2009); Saxton v. Commonwealth, 315 S.W.3d 293, 300 (Ky. 2010).

The Appellants' argument requires the Court to completely ignore the well established statutory construction rules as well as the plain unambiguous language and meaning of the statute itself. KRS 65.760 is not meaningless. This statute quite simply and very clearly permits local government a method to fund a 911 service. One method permitted is for local government to charge a "fee."

Appellants argue that an occupied residential or commercial unit is not a user of 911 Service and that the charge has no relation to the use of 911 Service. Appellants Br. at 4.

However, Appellants fail to recognize that the occupied residential or commercial units have occupants who are provided the service. Obviously, a unit cannot access the 911 system, but its occupants can in order to call for emergency services to protect themselves, as well as the Appellants' property being occupied. Moreover, Appellants fail to consider the benefits that the units, in and of itself, receive from 911 service. Appellants further argue that this is a 'Property Charge' in conflict with KRS 91A.510-530 and is an unlawful tax. Appellants Br. at 4. The Ordinance does not create a 'Property Charge', but a valid user fee that is in harmony with KRS 91A.510-530 and Kentucky case law.

### A. The Circuit Court Decision is a Proper Interpretation of Kentucky's User Fee Statute.

KRS 65.760 specifically authorizes the 911 service fee imposed by the Ordinance. Pursuant to the statute, the funding of 911 service can be accomplished by means of a fee on telephone service, by special tax, license or by a fee. Of course these methods must not be in conflict with the Constitution or other statutes of our state. See KRS 65.760.

KRS 65.760 makes it clear that this particular government service (911 Emergency Telephone System) can be funded by ad valorem taxes, franchise taxes, license taxes, or by a fee so long as that fee is consistent with the state's Constitution and existing statutory law.[7] The Appellees chose to replace the Subscriber Charge with a user fee which is one of the four methods for funding the 911 service. R. at 249. KRS 65.760 specifically permits the County to raise revenues to fund 911 service by means other than a tax. This is in contrast to fire services and emergency ambulance services, **which must** be funded through ad valorem taxes. See KRS

[7] Despite the Circuit Court's determination, Appellees' believe that KRS 65.760 expands the revenue raising capacity of different local government units funding this system to the maximum allowed under the law as illustrated by the lack of limitations on revenue raising in the statute itself. See R. at 249.

§ 75.040. The cases of Barber v. Commissioner of Revenue, 674 S.W.2d 18 (Ky. App. 1984), and City of Bromley v. Smith, 149 S.W.3d 403 (Ky. 2004), which Appellants primarily rely upon, were decided based upon limitations placed on fire districts and emergency ambulance services by statute and by the Kentucky Constitution. Due to the provisions of KRS 65.760, the Fiscal Court does not have the same statutory limitations as do fire districts and emergency ambulance districts.

To be consistent with the Kentucky Constitution and existing statutes, the "fee" authorized in KRS 65.760 must bear a relationship to the benefit received by the payor. Kentucky River Authority v. City of Danville, 932 S.W.2d 374, 376 (Ky. App. 1996). The benefits property owners of occupied residential and commercial units derive from an efficient, updated and responsive 911 Emergency Telephone System include not only the safety of their occupants and property but also improvement in conditions of health, comfort and convenience. In Kentucky River Authority, the court stated,

> We think that in this case of a surface drainage improvement area, any property that geographically is a part of the watershed or drainage basin may properly be considered to be benefited by the project through the general improvement of conditions of health, comfort and convenience in the area and the resulting general enhancement of values in the area.

Id. (citing Curtis v. Louisville and Jefferson County Metropolitan Sewer District, 311 S.W.2d 378 (Ky. 1958)). Like the property geographically located in the improvement area, the units of property in Campbell County in the instant matter are also benefited by the "general improvement of conditions of health, comfort and convenience in the area and the resulting general enhancement of values." Id.

The fee imposed by the Ordinance bears a rational relationship to the services provided to those charged the fee. In fact, there is no more rational relationship for a fee that could have

been successfully created than what was created by the Ordinance. The mere fact that there may be people who do not pay the fee but still receive a benefit is of no consequence. The Appellants suggest somehow a fee imposed on only those who make 911 calls is appropriate. The number of landlines in the county has dropped from 43,700 in 2001 to only 26,700 in 2013. R. at 190-192 (Horine Aff. ¶ 7). Clearly that system is not only untenable, but grossly unfair. It is the property owners of occupied residential and commercial units in Campbell County that benefit the most from the Emergency Telephone System. A call by a neighbor to the Emergency Telephone System because of a domestic dispute occurring in Appellants' apartment unit benefits both the property owner and the resident suffering domestic violence. Unquestionably, the property owner benefits from his property being used peaceably. There are persons other than property owners who are benefited from this service, but it can hardly be argued that the property owner receives any less benefit than any other person in Campbell County. Simply by the mere fact of the size of their investment; property owners receive substantially more of a benefit.

The Kentucky Supreme Court has held that courts must give effect to the intent of the General Assembly. Maynes v. Commonwealth, 361 S.W.3d 922 (Ky. 2012). When the General Assembly authorized the use of subscriber fees in KRS 65.760, most occupied households had at least one landline. During the period of time from 2001 to 2013 landlines decreased by about 40% leaving the remaining 60% of landline owners with the burden of supporting the system. R. at 190-192 (Horine Aff. ¶ 7). The clear intent of the subscriber fee was that all occupied units, both residential and commercial, would bear the costs of this system that was being provided for their use. The Ordinance re-establishes the intent of the statute that occupied units being supplied with the benefits of the system are to support the system.

Appellants' contention that the Ordinance does not create a valid user fee is based solely on the dictionary definitions that they have found for "user" and "use." Appellants Br. at 6-7. The Appellants chose to ignore the Kentucky case law that has developed for the statutory definition of "user fee." The Circuit Court's definition of "user fee" adopts the meaning of "user fees" as provided for by Kentucky case law to be discussed further in this brief. The Appellants' interpretation of "user fee" would make KRS 65.760 facially unconstitutional and impractical. KRS 65.760 provides for a subscriber fee based on each land line without regard to the use by the subscriber. Most people with landlines will never actually dial the 911 service and under Appellants' definition of "user" the subscriber fee would be facially unconstitutional. Furthermore, to charge only those individuals who actually call the 911 system would make the fee impracticable as persons would be reluctant to call 911 for the aid of another if they were going to receive a bill for making the call. The Circuit Court's ruling on the term "user fee" is clearly supported by case law discussed in the following sections of this brief.

The Appellants' argument that the property itself does not use 911 services requires a narrow and tortured meaning of the word ***"use."*** Appellants Br. at 6. This is simply an error. KRS 91A.510 and KRS 65.760 are to be construed liberally with a view to promote its object and carry out the intent of the legislature. See KRS 446.080(1). The definition of the word "use" is more than just actual use, but also includes "the privilege or benefit of using something" and "the ability or power to use something."[8] Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/use (last visited March 21, 2015).[9] Further, the New Oxford American Dictionary lists several definitions for use including "one would . . .

[8] Although Appellants' cite to Black's Law Dictionary, it should be noted that this dictionary is used and focuses on providing legal definitions and terms and does not cover all words like a standard or common dictionary. In fact, Appellants note in their brief that words are given common meaning, and thus, should not be given a legal meaning. See Appellants Br. at 6 (citing KRS 446.080).

[9] A copy is attached hereto as Exhibit F.

benefit from," "the ability or power to exercise or manipulate something," and "value or advantage of something" New Oxford American Dictionary 1853 (2nd Ed. 2005).[10] Whenever a parcel of property receives the benefit of 911 services, it is a user of such a service. If Appellants' property is engulfed in flames and a passerby calls 911 in order to dispatch emergency equipment to salvage the Appellants' property, the Appellants' property is the user of the 911 service. There can be no doubt that the Appellants' property is a beneficiary of the 911 Emergency Telephone System under this described scenario. The variety of ways Appellants' property benefit from 911 services is endless. Thus, this Court should find a broader definition of the word "use" as proffered by Appellees and in accordance with KRS 446.080(1).

Moreover, a decision of a broader definition is supported by common sense. As this Court has noted, "when all else is said and done, common sense must not be a stranger in the house of the law." Cantrell v. Ky. Unemployment Ins. Comm'n, 450 S.W.2d 235, 237 (Ky. 1970); see also Campbell County Library Bd. of Trs. v. Coleman, 2015 Ky. App. LEXIS 39. Occupied residential and commercial units all directly benefit from the Emergency Telephone System and the Campbell County Ordinance is the fairest way to impose a fee for the Emergency Telephone System. See also City of Huntington v. Bacon, 473 S.E.2d 743 (W. Va. 1996) (upholding a fee for fire and flood protection services based on building square footage was a valid fee because the fee was authorized by statute and although the service is not imposed upon all users of the services, "common sense dictates that owners of property benefit most."); Clay County Citizens for Fair Taxation v. Clay County Comm'n, 452 S.E.2d 724 (W. Va. 1994) (holding that an annual fee on the owner or occupant of a living unit within the county for ambulance service was constitutional when state statute granted municipalities the power to levy fees similar to the grant found in KRS 65.760). The fee imposed on landlines has not been

[10] A copy is attached hereto as Exhibit G.

challenged in over thirty years even though many people who have landlines have never made a 911 call. The fee is imposed for the service supplied and made available even if it is never actually used. When the Legislature provided fees as a method of funding the 911 service, they certainly could not have intended that someone calling for emergency service would receive a bill for placing a 911 call, or that less than one-half of the citizens of Campbell County would bear the entire cost of the Emergency Telephone System. As previously noted, "[i]n construing statutory provisions, it is presumed that the legislature did not intend an absurd result." Commonwealth Central State Hospital v. Gray, 880 S.W.2d 557, 559 (Ky. 1994).

There may be other ways to impose a fee for this service, but none would be more rational or related to the benefit received than that chosen by the Fiscal Court. Furthermore, if the legislature had intended that the 911 service fee be funded only by a subscriber fee or an ad valorem tax, as Appellants apparently believe is the only proper method of funding the service, they would not have provided the option of imposing a fee to fund the 911 service. Obviously, the Appellants' position on how the Emergency Telephone System should be funded is contrary to the will of the Kentucky Legislature.[11]

### B. The User Fee Is Not an Unlawful Tax and the Circuit Court Correctly Distinguished Bromley and Barber.

KRS 65.760(3) specifically provides for the 911 fee enacted by the Fiscal Court:

> The funds required by a city, county, or urban government, or urban government to establish and operate 911 emergency telephone service or to participate in joint service with other local governments may be obtained through the levy of any special tax, license, ***or fee*** not in conflict with the Constitution and the statutes

[11] The Appellants, in footnote 33 of their brief, argue that the Ordinance violates KRS 133.220 and KRS 134.119 because the fee is included on the property tax bills. The Appellants did not raise this issue with the Circuit Court and it is not proper for them to raise this issue for the first time on appeal. It is a basic appellate rule that an alleged error may not be raised for the first time on appeal. Carrier v. Commonwealth, 142 S.W.3d 670, 676 (Ky. 2004).

> of this state. The special tax, license, or ***fee may*** include a subscriber charge for 911 emergency telephone services that shall be levied on an individual exchange-line basis, limited to a maximum of twenty-five (25) exchange lines per account per government entity. (emphasis added)

There is no dispute that the 911 service fee created by the Ordinance is not a regulatory tax or fee, a special assessment or an ad valorem tax. Although KRS 65.760(3) allows the Fiscal Court the option to also fund the Emergency Telephone Service by a special assessment or an ad valorem tax, the Fiscal Court has chosen to fund the Emergency Telephone Service by a fee. KRS 65.760(3) makes it clear that a subscriber charge for 911 emergency telephone service is ***not*** the only fee that may be charged to raise funds for the Emergency Telephone Service.

The 911 fee is authorized by KRS 65.760 (3) and also fits within the definition of a "User Fee." KRS 91A.510 defines "User Fee" as "the fee or charge imposed by a local government on the user of a public service for the use of any particular service not also available from a nongovernmental provider." There can be no dispute that the Emergency Telephone Service is a public service that is not also available from a nongovernmental provider. The Appellants' contention is that the fee is charged against persons who are not users of the public service. This is certainly not the first time that a litigant has raised this argument regarding fees for a public service.

For example, in Long Run Baptist, the Baptist Association challenged the constitutionality of a 'service charge' allowed under KRS 76.080 to fund the storm water drainage program imposed by the Metro Sewer District ("MSD"). Long Run Baptist Assoc., Inc. v. Louisville & Jefferson Cnty. Metro. Sewer Dist., 775 S.W.2d 520, 521 (Ky. App. 1989). The Court of Appeals held that the service charge was not a tax. Id. at 524. The court reasoned that "[s]ince Chapter 76 clearly gives MSD express authority to impose a service charge to fund its

comprehensive county-wide drainage system, and our supreme court (*sic*) has held Chapter 76 to be constitutional in all respects, we affirm the trial court's ruling that the charge at issue is not a tax." Id. at 523 (citing Veail v. Louisville & Jefferson Cnty. Metro. Sewer Dist., 197 S.W.2d 413, 418 (Ky. 1946)).

The Appellate Court succinctly noted that "[a] tax is universally defined as an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular service." Id. (citing Dickson v. Jefferson Cnty. Bd. of Educ., 225 S.W.2d 672 (Ky. 1950)). The court reasoned it was a fee because KRS 76.080 gave the Sewer District jurisdiction over the system and the ability to set rates for services. Id. at 522. The court found in favor of the Sewer District despite the Baptist Association's contention that there was no rational relationship to a benefit because the benefits derived were incapable of measurement and were indirect, similar to fire prevention. Id.

Moreover, the court rejected the Baptist Association's argument that some property owners received no benefit because they constructed their own system or the storm water runoff drains from their property directly into the Ohio River by stating that:

> [S]imilar arguments were presented and rejected in Curtis v. Louisville and Jefferson County Metropolitan Sewer District, Ky., 311 S.W.2d 378 (1958), where property owners argued that KRS § 76.260 (which was later repealed) was unconstitutional because it established a conclusive presumption that all land within a designated surface drainage improvement area would receive some benefit. Because some property was at an elevation high enough to provide a vested right to the free flow of surface water, property owners argued that such property could not be benefited by the improvement. The court disagreed.
>
> We think that in the case of a surface drainage improvement area, any property that geographically is a part of the watershed or drainage basin may properly be considered to be benefited by the project through the general improvement of conditions of health, comfort and convenience in the area and the resulting general

> enhancement of values in the area. The circuit court held that ***all property in the area could be deemed to be benefited***, and we affirm the holding.

Id. at 522 (emphasis added). Absent from this ruling was a requirement that the benefit be required to have an exacting or calculable measurable benefit. See also Bloom v. Ft. Collins, 784 P.2d 304 (Co. 1989) (relying on precedence from storm drainage fees to find that a transportation utility fee based on street frontage of property was a valid fee even though it was not a mathematical exactitude). The benefits provided by the Emergency Telephone Service are certainly as beneficial as the surface drainage improvement area that was held to benefit those in the area by general improvement of health, comfort and convenience. It cannot be reasonably argued that the Emergency Telephone Service fails to provide a benefit to all whom live and own inhabited improved real property in Campbell County. Furthermore, the Fiscal Court made a finding in the Ordinance that, "[t]he establishment, maintenance, and operation of the Campbell County Consolidated Dispatch Center is an essential public safety service used by residents of Campbell County." R. at 19. The Appellants who own real estate and rent their residential units to individuals also cannot claim that they do not receive the benefit of the Emergency Telephone Service which is provided and made available to them twenty-four (24) hours a day and seven (7) days a week to provide protection for their real property and their tenants. R. at 190-192. (Horine Aff. ¶ 11).

The Appellants' reliance on City of Bromley v. Smith, 149 S.W.3d 403 (Ky. 2004) and Barber v. Commissioner of Revenue, 674 S.W.2d 18 (Ky. App. 1984) is misplaced. Appellants brief overstates the relevance of Bromley and Barber and incorrectly interprets the holding in Long Run Baptist.

In Barber the Court stated, "that the statutes authorize fire protection districts and volunteer fire departments to be funded by **ad valorem taxes. KRS 75.040."** Barber, 674 S.W.2d at 21 (emphasis added). Similarly, in Bromley the Court stated, "[i]t is of interest to note that the legislature has specified an ad valorem tax as a method of financing emergency ambulance services in KRS 75.040." Id at 405-6. Additionally, the Court in Bromley stated:

> It should also be understood that special assessments for municipal improvements and user charges for the provision of measurable services, such as waste collection and storm water drainage, are not technically considered taxes and **are not a part of this decision.**

Id. at 404 (citing Cf. Long Run Baptist Association, Inc. v. Louisville and Jefferson County Metropolitan Sewer District, 775 S.W.2d 520 (Ky. App. 1989) (emphasis added).

Neither Barber nor Bromley were decided or considered on the basis of being user fees and both involved a funding scheme that only authorized the provision of emergency fire and ambulance services by ad valorem taxes. Furthermore, City of Bromley recognized in its opinion that the case of Long Run Baptist did not involve a tax. Id. Unlike Barber and Bromley, but similar to Long Run Baptist and the case at bar, the legislature has specified that the funding of these two governmental services can be funded by fees. The enabling statutes used in Long Run Baptist and the case at bar are similar in that they both provide for user fees. The case at bar should be decided under the principles established in Long Run Baptist.

In Long Run Baptist and in this matter, it is shown that the Legislature chose to allow service charges or fees to fund the drainage system and 911 services as opposed to only mandating an ad valorem tax to fund many governmental services such as fire protection and ambulance service. This is an important factor in squaring the decision in Long Run Baptist, with the decisions in the cases of Bromley and Barber relied on by the Appellants. In Barber, the Kentucky Supreme Court stated:

> [W]e find that the statutes authorize fire protection districts and volunteer fire departments to be funded by ad valorem taxes.

Barber, 674 S.W.2d at 21 (referencing KRS 75.040). Later the opinion went on to hold:

> We conclude that the constitution and statutes intend for governmental services, such as fire protection, to be shared equally and equitably by all in the community who own property. The proper way is to charge all real and personal property to be benefited by the fire protection with a rate times the assessed value of property.

Id.

As opposed to fire districts and emergency ambulance services which are both subject to funding its services by imposition of ad valorem taxes, KRS 65.760 clearly allows governmental units to fund the Emergency Telephone Service by way of fees or ad valorem taxes. The Fiscal Court has elected to fund the Emergency Telephone Service by fees and not by ad valorem taxes. Thus, this Court should find that the user fee is not an unlawful tax and that the Circuit Court correctly distinguished Bromley and Barber.

### C. The Circuit Court Properly Relied on Case Law Involving Charges Authorized by Other Statutes and User Fee Law in Upholding the User Fee.

Although Curtis v. Louisville and Jefferson County Metropolitan Sewer District, 311 S.W. 2d 378 (Ky. 1958) was a case involving special assessments, Appellants' premise that Long Run Baptist was decided based upon the principles of "Special Assessments" and not "User Fees" is in error. Appellants correctly state that "[t]here are four legally prescribed general methods by which the County and other political subdivisions in Kentucky may exact funds from their residents." Appellants Br. at 4-5. One of which is by special assessments that are governed by KRS 91A.200-290 and KRS 107.010-220. KRS 91A.210 defines "Improvement" as "**construction** of any facility for public use or services or any addition thereto." (emphasis

added). KRS 91A.210 defines "Special Assessment" as "special charge fixed on property to finance an **improvement** in whole or in part." (emphasis added).

Likewise, KRS 107.010 authorizes municipalities to construct and finance improvements as defined in Chapter 107. KRS 107.020 defines an improvement as construction of public ways, sanitary and storm sewers, sewage treatment plants and fire hydrants. Neither of these sections authorizes special assessments to be used for the day to day operations and maintenance of the facilities that are constructed. As stated in Barber v. Commissioner of Revenue, 674 S.W.2d 18, 21 (Ky. App. 1984), regarding special assessments:

> The charge would be a one-time charge and it might be payable by single or periodic payments. It is not a recurring annual charge, however, such as the City of Silver Grove's fire protection service charge. The special assessment for public improvement projects is authorized by KRS Chapter 107. It is a method of financing municipal improvements, and there is a limit as to how many times and how frequently owners may be assessed for improvements such as sewers and streets, etc.

The Court in Long Run Baptist stated that:

> On October 5, 1987, appellants filed a declaratory judgment action challenging the constitutionality of a '**service charge**' imposed to fund the storm water drainage program developed by Louisville and Jefferson County Metropolitan Sewer District (MSD) in cooperation with the city of Louisville and Jefferson County. The charge, which was implemented on January 1, 1987, is $1.75 per month for single and two family residences and $1.75 per 2,500 square feet of impervious surface for commercial and industrial property.

Long Run Baptist, 775 S.W.2d at 521. (emphasis added). Clearly, Long Run Baptist was decided under the principles of user fees and not upon the principles of special assessments. The Court in Long Run Baptist stated that "MSD can establish and impose charges for **services rendered**." Id. at 522 (emphasis added). The charges in Long Run Baptist concerned the

charging of fees for services to fund the continuing operating expenses and not for the construction of facilities. The Court in Long Run Baptist never indicated that the matter was being reviewed under the principles of special assessments. The case at bar and Long Run Baptist should both be analyzed as authorizing user fees and not special assessments.

Lastly, the Appellants cite the case of Kentucky River Authority v. City of Danville, 932 S.W.2d 374 (Ky. App. 1996) for the proposition that the Ordinance is a fee charged without relationship to the benefit received by the payor. Once again, the case cited by the Appellants supports the Fiscal Court's position that the fee is a user fee and not a tax. The court stated:

> A tax is universally defined as an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular service. Taxes are a means for the government to raise general revenue without regard to direct benefits which may inure to the payor or to the property taxed.

Kentucky River Authority, 932 S.W.2d at 376 (Ky. App. 1996) (quoting Long Run Baptist Assoc., 775 S.W.2d at 522)). In Kentucky River Authority, the Court of Appeals held that, "[t]he funds generated from the fees are to be used for the specific purpose of conserving and controlling the waters in the Kentucky River basin and are incidental to the statute." Id. Likewise, the funds generated from the fees for the Emergency Telephone Service are to be used for the specific purpose of operating the Emergency Telephone Service and are not to be used for other purposes as are taxes. As previously indicated, the Appellants are benefitted by the Emergency Telephone Service. Similar to the Appellants, the City of Danville also believed that it did not benefit from the activities of the Kentucky River Authority because it has a well-functioning water system and does not directly withdraw water from the Kentucky River. However, the Court held that,

> Preservation of the Kentucky River basin is a benefit which obviously accrues to all within its boundary. We therefore hold to

> be clearly erroneous the trial court's finding that no benefit to the City of Danville exists.

Id. at 377. (citing Yount v. Calvert, 826 S.W.2d 833 (Ky. App. 1991)).

Again, the court reasoned City of Danville benefited even though there was no measurable service provided to the City of Danville. Id. The Appellants without question are benefitted by the operation of the Emergency Telephone Service and certainly would not agree that if they do not pay this fee that the dispatch center would not need to dispatch the fire department to put out a fire or render aid to one of their tenants. Appellants would however agree that if their tenants knew that Emergency Telephone Service would not dispatch emergency services to their apartment buildings that they would have difficulty in retaining tenants. The Emergency Telephone Service is supplied and made available to the Appellants on a 24/7 basis whether or not they choose to avail themselves of the service.

### D. The Circuit Court Properly Applied Federal Case Law.

Appellants argue that the Circuit Court misapplied the holding in United States v. Sperry Corp, 493 U.S. 52 (1989), in its determination that the 911 fee was a valid user fee. Appellants believe that the holding in Sperry is not relevant to the case at bar because the Sperry Corporation had specifically benefited from the Tribunal's services and that the case stands for the proposition that a user fee is valid only where there is an actual use of the service. Appellants Br. at 18. Furthermore, Appellants state that the Supreme Court in Sperry did not consider the statutory definition under KRS 91A.510. Id. KRS 91A.510 states that a user fee "means the fee or charge imposed by a local government on the user of a public service for the use of any particular service not also available from a nongovernmental provider."

The Sperry case dealt with a user fee charged by the United States government on the users of a public service, the tribunal, which was not available from a nongovernmental provider. The Sperry Court was analyzing the meaning of user fee that is the same as the Kentucky statutory definition of a user fee. The Appellants miss the point of the holding in Sperry. The Sperry case cannot be separately analyzed from the holding in Massachusetts v. United States, 435 U.S. 444 (1978). In Sperry, the Court stated:

> This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a 'fair approximation of the cost of benefits supplied.'

Sperry, 493 U.S. 60 (quoting Massachusetts v. United States, 435 U.S. 444, 463, n.19 (1978)).

The Sperry Corporation never argued that it did not use the tribunal, but that the charge was not valid "because there has been no showing that the amount of the deduction approximates the cost of the Tribunal to the United States or bears any relationship to Sperry's use of the Tribunal or the value of the Tribunal's services to Sperry." Id. at U.S. 60. The Court drawing upon its opinion in Massachusetts v. United States stated what the Appellants remarked as merely dictum:

> Furthermore, Sperry may be required to pay a charge for the availability of the Tribunal even if it never actually used the Tribunal; Sperry received the 'benefit from [the Tribunal] in the sense that the services are available for [its] use.'

Id. at 63 (quoting Massachusetts v. United States, 435 U.S. 444 (1978)).

In Massachusetts, the United States enacted 26 U.S.C § 4491 to help recover the cost to develop and strengthen an integrated national air system. Massachusetts v. United States, 435 U.S. 444, 446, 450 (1978). Section 4491 imposed an annual charge on aircraft depending on the

type and weight of the aircraft and not how often the aircraft used the services offered by the United States. Id. Despite the fact that the charge is labeled as a tax it was analyzed under the requirements of user fees. Id. at 463. The Court stated,

> Having established that taxes that operate as **user fees** may constitutionally be applied to the States, we turn to consider the Commonwealth's argument that § 4491 should not be treated as a user fee because the amount of the tax is a flat annual fee, and hence is not directly related to the degree of use of the airways.

Id. at 463 (emphasis added). The most important statement made in the Massachusetts case in upholding the user fee and that is also applicable to the case at bar was when the Court stated:

> But the present scheme nevertheless is a fair approximation of the cost of the benefits each aircraft receives. Every aircraft that flies in the navigable airspace of the United States has available to it the navigational assistance of other special services supplied by the United States. And even those aircraft, if there are any, that have never received specific services from the National Government benefit from them in the sense that the services are available for their use if needed, and in that the **provision of the services makes the airways safer for all users**.

Id. at 468. (emphasis added).

Certainly, the Appellants do not and cannot contend that the 911 emergency communication services are not available to them and their tenants and that the system does not make the place where they live safer for all users. In Massachusetts, the fact that other aircraft are using the navigational assistance makes the airspace safer for the aircraft that do not specifically use the navigational system provided. Likewise, the fact that people other than the Appellants are using the 911 system makes the Appellants tenants and property safer. It might be the neighbor who calls 911 to report a fire for one of the Appellants' properties that benefits the Appellant. Under the Appellants' theory, the 911 fee should be charged to the person who

called to report the fire at Appellants' property. This would certainly lead to an absurd and unmanageable result in charging for user fees.

As in Long Run Baptist Assoc.,Inc. v. Louisville and Jefferson County Metropolitan Sewer District, 775 S.W.2d 520 (Ky. App. 1989) where those who within the sewer district benefited from the services provided even if they did not directly receive any services, the Appellants and their tenants are benefited by the 911 emergency telephone system. The Court in Long Run Baptist determined that they were benefited from the improvement of the health, comfort and convenience in the area resulting in general enhancement of values in the area. Id. at 522.

The 911 fee is similar to a garbage collection fee authorized under KRS 109.056. Garbage collection is also a service that protects the health and safety of persons located within the county. Like those using 911 services, the garbage fee is on the one who benefits from the service and the availability of the service. As in Sperry and Massachusetts, the residents are benefited from the garbage service in the sense that the service is available for its use. The fee is for the availability of the service being supplied whether or not the user actually uses the service. A citizen cannot elect to opt out of the garbage fee provided for in KRS 109.056 by claiming that he or she never uses the service. Regardless of whether the user generates a lot of garbage or a little, they benefit from the service.

### E. **The Ordinance Is Not An Unconstitutional Flat Tax.**

The Ordinance does not impose an ad valorem tax even though such a tax is permissible under KRS 65.760. The fee is not based upon the assessed value of the real property. The fee is based on each individual occupied residential and commercial unit located within the county and

that number is not based on the tracts of property or property value. The fee is also not an unconstitutional flat tax because the fee is for the maintenance and operation of the Emergency Telephone Service provided for the benefit of the users.

The 911 service fee has a rational relationship to a benefit of the payor and therefore is not an unconstitutional flat tax.

> "The law raises a presumption in favor of the validity of the ordinance and the burden is on the person attacking it to show its invalidity. Should reasonable minds differ as to whether the ordinance has a substantial relation to the public health, morals, safety or general welfare, the ordinance must stand as a valid exercise of police power."

City of Louisville v. Puritan Apartment Hotel Co., 264 S.W.2d 888, 890 (Ky. 1954) (citing Schloemer v. City of Louisville, 182 S.W.2d 782 (Ky. 1944)).

The Emergency Telephone System specifically benefits all of the Appellants by not only protecting their property, it also provides a service of helping to protect the health and safety of their tenants who are in possession of their property with their consent and for the property owners' benefit. Clearly, the Appellants are benefited by the actual and ongoing providing of this service to their tenants and also providing this service for the protection of their property. The 911 Service is fully deployed into the community on a 24 hours a day and 7 days a week basis. It is not an ambulance that is sitting at the fire station waiting to be deployed. The relationship to the 911 service provided to Appellants is as close, if not closer, than the relationship of the service provided to landowners in the cases of Long Run Baptist and Kentucky River Authority.

### F. The Circuit Court's Decision Did not Circumvent the Political Process

Appellants' final argument is made without any factual basis. Appellants argue that the Circuit Court's decision opens the floodgates for local governments to raise taxes by calling them user fees. Appellants continue to overlook the fact that the legislature has provided local governments with the tools necessary to fund specific services. The legislature has chosen to provide for certain services such as fire and ambulance services by means of ad valorem taxes. In the instance of the 911 system, the Legislature has chosen to allow for the funding of the 911 services by means of fees as well as by special assessments and taxes.

Appellants criticize the Appellees as politicians seeking to avoid public scrutiny by choosing an option of funding the 911 system as provided by the legislature. The Appellants want to limit the meaning of the statute to only allow the funding of the 911 system by the imposition of ad valorem taxes. (Although Appellants have loudly proclaimed a flat fee on telephone landlines subscribers is completely within the bounds of the law.)

Appellants' footnote 93 discusses how other local governments have chosen to raise revenue to fund governmental services. Their argument is not relevant to what method the Appellees have chosen to fund the 911 service.[12] Appellants are seeking to have this Court invade the province of the legislative process to determine that another method more to the liking of the Appellants is the proper funding method.

## III. CONCLUSION

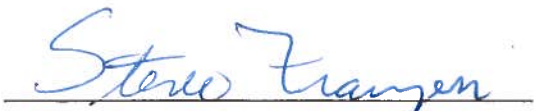
No one, including the Appellants, can seriously argue that a 911 Emergency Telephone System is not an extremely important government service. If the Appellants want to argue that somehow they do not benefit from this service, they have a serious credibility issue. Obviously,

[12] Albeit, Appellees' are mystified on how Appellants can find that Shelby County's fee is valid but somehow the 911 Service Fee is not. Both are clearly aimed at units which have individual and separate addresses.

the Appellants directly benefit from the provision of the 911 services to their property through the increase in values of their property and for the improvement of conditions of health, comfort and convenience. The 911 service is not the same as ambulance or fire services. The 911 system is actively deployed into the community waiting for a user to access the system in order to have efficient access to emergency services.

The Legislature recognized how important this service was and passed a very specific statute to enable local governments to fund this important service. The obvious will of the Legislature, as well as its clear intent should be upheld by this Court. The Legislature said 911 service can be funded by a "fee." That this fee confers a distinct benefit upon the Appellants, is used only to fund the 911 emergency service, and is segregated from the rest of the Fiscal Court's funds, revenues and fees is undisputed. KRS 65.760 is constitutional and, therefore, so is Campbell County Fiscal Court's Ordinance 0-04-13.

Respectfully submitted,



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